

Case Summary

David Thomas appeals his convictions and sentence for two counts of Class A felony child molesting and three counts of Class C felony child molesting. We affirm.

Issues

Thomas raises three issues, which we restate as:

- I. whether, as a matter of law, a child's pretrial statement to investigators must be recorded;
- II. whether there is sufficient evidence to support his convictions; and
- III. whether he was properly sentenced.

Facts

Stepsisters A.A., born on April 17, 1992, B.W., born on October 1, 1993, and V.W., born on February 28, 1995, frequently stayed at B.W. and V.W.'s grandmother's house when A.A.'s mother and B.W. and V.W.'s father worked nights. B.W. and V.W.'s grandmother's long-term, live-in boyfriend was Thomas. Between March 1, 2001, and December 27, 2003, Thomas molested A.A., B.W., and V.W.

B.W. reported the molestation to a friend, and the friend told a teacher. The teacher asked each girl about the allegations, and they admitted that Thomas had molested them. A.A.'s mother and B.W. and V.W.'s father were informed of the allegations and reported them to the police. During the course of his investigation, Deputy Sean Trevarthan of the Vigo County Sheriff's Department interviewed the girls at the Child Protective Services offices. Deputy Trevarthan interviewed A.A. first and did not record her statement because he was not sure if she had been molested. Deputy

Trevarthan then interviewed B.W. and T.W. and made audio recordings of their statements.

On June 10, 2004, the State charged Thomas with two counts of Class A felony child molesting and one count of Class C felony child molesting for incidents involving B.W. The State also charged Thomas with one count of Class C felony child molesting relating to V.W. and one count of Class C felony child molesting relating to A.A. After a jury trial, at which all three girls testified, Thomas was found guilty as charged.

On May 6, 2005, after finding no mitigating circumstances or aggravating circumstances, the trial court sentenced Thomas to the presumptive sentence on each count. The trial court ordered the sentences to be served concurrently for a total sentence of thirty years. Thomas now appeals his convictions and sentence.

Analysis

I. Recorded Statements

Comparing the interviewing of child witnesses to the interrogation of criminal defendants,¹ Thomas argues that A.A.'s, B.W.'s, and V.W.'s statements to investigators should have been recorded as a matter of law. Thomas urges that the girls' "statements be suppressed for the failure to record accords with the state's duty to preserve

¹ We have concluded that the standard for evidence preservation under the Indiana Constitution is consistent with the federal analysis and have held that Article One, Section Twelve of the Indiana Constitution does not require law enforcement officers to record custodial interrogations of defendants in places of detention. Stoker v. State, 692 N.E.2d 1386, 1390 (Ind. Ct. App. 1998). Nevertheless, we strongly recommended such recordings. Id.

evidence.”² Appellant’s Br. p. 9. Thomas does not appear to have objected on this basis at trial but contends, “Trial counsel had no basis to object at trial because the law does not require the recording of child victims in molest cases. Thomas urges a change in the law.” Appellant’s Br. p. 5.

Generally, the failure to object at trial customarily means that a party has not preserved any claim for appeal. Goodwin v. State, 783 N.E.2d 686, 687 (Ind. 2003). It is well settled that an appellant is normally denied the right to raise an issue for the first time on appeal. Bunch v. State, 778 N.E.2d 1285, 1288 (Ind. 2002); see also Whitfield v. State, 699 N.E.2d 666, 669 (Ind. Ct. App. 1998) (waiving argument that failure to tape record interrogation process leading to defendant’s confession violated Article I, Section 12 of the Indiana Constitution because it was made for the first time on appeal), trans. denied. We have observed that “a party may not sit idly by, permit the court to act in a claimed erroneous manner, and then attempt to take advantage of the alleged error at a later time.” Robles v. State, 705 N.E.2d 183, 187 (Ind. Ct. App. 1998). Without more, we are not convinced that seeking a change in the law on appeal obviates the need for a timely objection at trial or somehow permits a party to raise an issue for the first time on appeal. This issue is waived.

II. Sufficiency of the Evidence

Thomas also argues that there is insufficient evidence to support the convictions. Upon a challenge to the sufficiency of evidence to support a conviction, we neither

² As the State points out, all three girls testified at trial and none of their pre-trial statements were offered as evidence at trial.

reweigh the evidence nor judge the credibility of the witnesses. McHenry v. State, 820 N.E.2d 124, 126 (Ind. 2005). We respect the jury's exclusive province to weigh conflicting evidence. Id. We must affirm Thomas's conviction if the probative evidence and reasonable inferences drawn therefrom could have allowed a reasonable jury to find him guilty beyond a reasonable doubt. See id.

Class A felony child molesting occurs when a person, who is at least twenty-one (21) years of age, performs or submits to sexual intercourse or deviate sexual conduct with a child under fourteen years of age. Ind. Code § 35-42-4-3(a). "Deviate sexual conduct" means an act involving a sex organ of one person and the mouth or anus of another person or the penetration of the sex organ or anus of a person by an object. I.C. § 35-41-1-9. Class C felony child molesting occurs when a person who, with a child under fourteen years of age, performs or submits to any fondling or touching, of either the child or the older person, with intent to arouse or to satisfy the sexual desires of either the child or the older person. I.C. § 35-42-4-3(b).

The evidence indicates that the girls viewed pornographic movies and magazines upon Thomas's request and that all three girls were present during the molestations.³ B.W. testified that Thomas touched her vagina with his tongue and that he put his penis in her mouth. B.W. also testified that Thomas touched her vagina and she touched his penis. V.W. testified that Thomas put his hand and mouth on her "front lower part," that he touched her chest, and that she touched his "front lower part." Tr. pp. 429, 436.

³ The evidence indicated that A.A. did not stay at Thomas's house as frequently as B.W. and V.W.

Finally, A.A. testified that Thomas touched her chest under her shirt and that he touched her vagina.

Thomas contends that the sole basis of the convictions is the conflicting, contradictory, and “preposterous” testimony of the children. Appellant’s Br. p. 16. Thomas points to the number of adults in the household while the children were present, the lack of a door on the bedroom, and the lack of a TV and VCR in the bedroom. Thomas also points to “friction” between A.A.’s mother and B.W. and T.W.’s grandmother. *Id.* Thomas’s challenge amounts to nothing more than a request for us to reweigh the evidence. We must decline this request. There is sufficient evidence to support Thomas’s convictions.

III. Sentence

Thomas also challenges his thirty-year sentence.⁴ Thomas argues that his sentence is contrary to law because the trial court ignored his lack of criminal history and good character as mitigating evidence.

In general, sentencing determinations are within the trial court’s discretion. If the trial court relies on aggravating or mitigating circumstances to enhance or reduce the presumptive sentence, it must (1) identify all significant mitigating and aggravating circumstances; (2) state the specific reason why each circumstance is determined to be mitigating or aggravating; and (3) articulate the court’s evaluation and balancing of the circumstances.

⁴ Thomas does not address the applicability of the revised sentencing statutes, which became effective on April 25, 2005, prior to his sentencing hearing. Also, Thomas does not challenge the appropriateness of his sentence.

Cotto v. State, 829 N.E.2d 520, 523-24 (Ind. 2005) (citations omitted). When addressing an argument that the trial court did not properly consider mitigating circumstances, we recognize:

The trial court is not obligated to accept the defendant's arguments as to what constitutes a mitigating factor. Nor is the court required to give the same weight to proffered mitigating factors as the defendant does. Further, the trial court is not obligated to explain why it did not find a factor to be significantly mitigating. However, the trial court may not ignore facts in the record that would mitigate an offense, and a failure to find mitigating circumstances that are clearly supported by the record may imply that the trial court failed to properly consider them. An allegation that the trial court failed to identify or find a mitigating factor requires the defendant to establish that the mitigating evidence is both significant and clearly supported by the record.

Comer v. State, 839 N.E.2d 721, 728 (Ind. Ct. App. 2005) (citations and quotations omitted), trans. denied (2006).

Here, neither proposed mitigating circumstance is significant or clearly supported by the record. As the trial court recognized at the sentencing hearing, Thomas has a previous conviction for possession of marijuana and possession of paraphernalia in Florida. This is inconsistent with his assertion that he had a lack of criminal history. Although his criminal history may not be significant, Thomas has not established that the trial court abused its discretion by failing to consider it as a mitigating circumstance.

With regard to his good character, Thomas was convicted of molesting three girls who thought of him as a grandfather. At best, the testimony at the sentencing hearing regarding his alleged good character is disputed in light of the convictions. Moreover, one of Thomas's own character witnesses testified that he was sometimes violent.

Sentencing Tr. p. 22. Another testified that she only saw his temper when “the car won’t do something right or somebody is going out back trying to poach deer.” Id. at 36. Given this testimony and the nature of the convictions, the trial court did not abuse its discretion by declining to give mitigating weight to Thomas’s character.

Conclusion

Because Thomas raises the issue of recording children’s pre-trial statements for the first time on appeal, it is waived. There is sufficient evidence to support his convictions. The trial court did not abuse its discretion by declining to give mitigating weight to Thomas’s criminal history and character. We affirm.

Affirmed.

SULLIVAN, J., and ROBB, J., concur.